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INTELLIGENCE SOURCES AND METHODS, RESTRICTED DATA, AND COMMUNICATION INTELLIGENCE UNDER THE PROPOSED FREEDOM OF INFORMATION ACT AMENDMENTS

Problem: Aide-Memoire

Senate Report: Recognition of Special Categories of Sensitive Information (Tab A)

House Report: Recognition of Statutory ("born classified") Sensitive Information (Tab B)

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Excerpt Senator Kennedy's Comments on S. 2543 Committee Report (Tab D)

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AIDE-MEMOIRE

Amendments to Proposed Freedom of Information Act Amendments

S. 2543

1. Section (b)(1) of S. 2543 as amended in Committee would overrule the decision of the Supreme Court in the Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973), by authorizing court review of the contents of records withheld by a Federal agency under the nine specific exemptions set forth in Title 5 U.S.C.A. 552(b). The purpose of such review would be to determine if the information withheld meets the criteria of the exemption involved.

2. Matters specifically exempted from public inspection by section 552(b) of the Freedom of Information Act include those "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy" [552(b)(1)]. It was this exemption which was at issue in the Mink case. A separate exemption from public inspection is afforded matters "specifically exempted from disclosure by statute" [552(b)(3)].

3. There is an important distinction between these two exemptions. The former refers to classification of information under Executive Order, which specifies criteria for evaluating and classifying governmental documents. The latter exemption, based upon express statutory authority, involves an act of Congress approved by the President which directs the proper handling of especially sensitive information. Three such categories of information are: Restricted Data [42 U.S.C.A. 2162], relating to atomic energy matters; Communication Intelligence [18 U.S.C.A. 798]; and Intelligence Sources and Methods [50 U.S.C.A. 403(d)(3) and g]. It should be made abundantly clear that it is not the intent of Congress to encourage or authorize a detailed court review of information which has been specifically designated in an act of Congress as deserving of statutory protection. This distinction is recognized by the Judiciary Committee in its report on S. 2543 (Tab A). The House report on H.R. 12471, a similar bill, also recognized this distinction for Restricted Data (Tab B).

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4. As reported out, S. 2543 recognizes that with respect to sensitive information a presumption should be accorded by the court to an agency head who has personally examined and determined that the records in question are secret. Senator Kennedy in a floor statement has noted this requirement (Tab D) which is also commented upon in greater detail in the Committee report (Tab A).

5. If S. 2543 as reported is amended to drop the procedures for the in camera court review recommended by the Committee, adoption of the Agency's original position (Tab E) is strongly urged.

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Excerpt from Senate Judiciary Committee

Report on S. 2543

By statute certain special categories of sensitive information—Restricted Data (42 U.S.C. § 2162), Communication Intelligence (18 U.S.C. § 798), and Intelligence Sources and Methods (50 U.S.C. § 403 (d)(3) and (g))—must be given special protection from unauthorized disclosure. These categories of information have been exempted from public inspection under section 552(b)(3), "specifically exempted from disclosure by statute," and (b)(1), "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." The Committee believes that these categories of information will be adequatey protected under S. 2543. If such information is ever subject to court review, the review will be conducted in camera under the procedures established in the bill for information exempt under section 552(b)(1), which has been amended to include matters specifically required to be kept secret "by an Executive Order *or statute*." It is also expected that in such cases the court will recognize that such information in inherently sensitive and that the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

The specific procedures delineated in section 552(a)(4)(B)(ii) apply only to cases where exemption (b)(1) is invoked.

S. Rept. 93-854, pages 16-17

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Even with the broader language of these amendments as they apply to exemption (b)(1), information may still be protected under the exemption of 552(b)(3): "specifically exempted from disclosure by statute." This would be the case, for example, with the Atomic Energy Act of 1954, as amended. It features the "born classified" concept. This means that there is no administrative discretion to classify, if information is defined as "restricted data" under that Act, but only to declassify such data.

The *in camera* provision is permissive and not mandatory. It is the intent of the committee that each court be free to employ whatever means it finds necessary to discharge its responsibilities.

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Court Review Provision in S. 2543

"(B)(i) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

"(ii) In determining whether a document is in fact specifically required by an Executive order or statute to be kept

(continued on next page)

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Court Review Provision in S. 2543 (continued)

secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the Government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

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Excerpt from Senator Kennedy's Floor Comments on

Judiciary Committee Report on S. 2543

Where agencies want to withhold documents under a statute or Executive order as being classified in the interest of national defense or foreign policy S. 2543 as amended provides that courts may examine the documents themselves in camera and must determine whether in fact the documents were properly classified. The bill sets out procedures to protect particularly sensitive information, and it provides that courts should utilize an in camera examination only if they cannot resolve the matter on the basis of arguments and affidavits. But it firmly establishes the principle of judicial review of—and accountability outside the executive branch for—agency decisions to classify material.

Congressional Record, May 16, 1974
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CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

OLC 74-0836

30 April 1974

Honorable John L. McClellan, Chairman
Intelligence Operations Subcommittee
Committee on Appropriations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This letter responds to your request for comments on the possible impact upon the operations of this Agency of S. 2543 which amends the Freedom of Information Act (5 U.S.C. 522).

Presently, this Agency's records are for the most part not available for public inspection because the Act exempts, among other things, matters that are:

> "(b)(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
> ---
> (3) specifically exempted from disclosure by statute;"

Although S. 2543 retains these general exemptions, it adds a new provision which would permit an in camera court review of any or all records to determine whether they shall be subject to public inspection. This provision appears to be designed to overrule a Supreme Court decision that the contents of records withheld under exemption (b)(1) are not reviewable by the courts (Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973)).

The National Security Act of 1947 provides:

> "... That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;" (Sec. 102(d)(3))

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This language is designed to protect the lives and welfare of sources of sensitive foreign intelligence information and to protect against the compromise of technical collection efforts.

I do not believe that the nation's interest would best be served by legislation which would make it possible for the most sensitive of Agency records to be subject to court review as a result of a suit by an individual, who under the statute may not even be a U.S. citizen, for their public inspection. It is recommended that information which is made inherently sensitive by statute be exempted from the court review provisions of S. 2543. Suggested language accomplishing this for three categories of sensitive information recognized by statute (Intelligence Sources and Methods, Communications Intelligence and Restricted Data) is enclosed.

If S. 2543 or similar legislation is favorably considered, it is hoped that you would be able to support appropriate exemption for this Agency as proposed.

Sincerely,

/s/

W. E. Colby
Director

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AMENDMENT TO S. 2543 (Committee Print, January 29, 1974)

The added language is underlined and would be inserted at line 16, page 3:

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64, such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

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